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CITATIONS

264721—53——1

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Civil Aeronautics Board respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on May 4, 1953.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68) is not yet reported. The orders and findings of the Civil Aeronautics Board (R. 6, 51, 62) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 78). The jurisdic-

tion of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, after having classified an air carrier's domestic and international operating divisions as separate units for rate-making purposes, the Civil Aeronautics Board, in fixing a "fair and reasonable" need mail rate for the international division which encompassed a period during which a final need mail rate was in effect for the domestic operations, was required by Section 406 of the Civil Aeronautics Act to reduce, by the amount of profit earned above a specified fair return on investment under the final domestic rate, the international mail pay allowance to which the carrier otherwise was entitled.

2. Whether, when domestic and international operating divisions of the same air carrier reasonably are classified as separate rate-making units, Section 406 of the Civil Aeronautics Act requires the Board to reduce an otherwise "fair and reasonable" need mail rate for one division by the amount of profit above a specified fair return on investment which has been earned or is anticipated to be earned from the operation of the other division.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, which will be referred to as the Act, are set forth in the Appendix, *infra,* pp. 20–23.

STATEMENT

At the time of the entry of the Civil Aeronautics Board order here involved, Chicago and Southern Air Lines, Inc. (C. & S.) conducted domestic operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international operations extending between Houston-New Orleans and Caracas, Venezuela via Havana and Kingston.[1] As is customary where a single carrier conducts both domestic and international operations of substantial size, the different divisions were classified by the Board as separate rate-making units for mail pay purposes, and different mail rates for the domestic and international divisions were fixed in different proceedings before the Board under its statutory authority to "fix different rates for different air carriers or classes of air carriers, and different classes of service" (Section 406 (b) *infra,* p. 22).

On July 28, 1948, the Board had fixed a final "need" or subsidy rate for the domestic operations to be effective on and after January 1, 1948. *Chicago and Southern A. L., Mail Rates,* 9 C. A. B. 786. The rate was an incentive sliding-scale rate

[1] C. & S. subsequently was merged into Delta Air Lines, Inc., and C. & S.'s certificates reissued to Delta. Delta was substituted in lieu of C. & S. as the intervenor below after the decision of the Court of Appeals (R. 79), and also has petitioned this Court for issuance of a writ of certiorari to review the judgment below. *Delta Air Lines* v. *Summerfield et al.*, this term.

designed to yield a higher return with either decreasing costs or increasing load factors, and was fixed at a level which, on the basis of predictions of future operations, would yield a return after taxes of 7.4% on investment allocated to the domestic operations.[2] The carrier actually earned a return on domestic investment of 12.51% for the years 1948–1950, or $654,000 more than a return of 7.4% (R. 65).

International operations had been inaugurated in 1946, and temporary or provisional "need" rates had been fixed for those operations (R. 8). The order here involved fixed a final lump sum need rate for the international operations for the past period November 1, 1946–December 15, 1950, and a need rate for the future period beginning December 16, 1950 (R. 59). Section 406 (b) of the Act (*infra,* p. 22) provides in part that, in fixing "fair and reasonable" mail rates, the Board "shall take into consideration, among other factors," the "need" of the carrier for mail compensation which, "together with all other revenue of the air carrier," will enable the carrier to "maintain and continue the development of air transportation." The Postmaster General contended before the Board that, under these provisions, the $654,000 above a 7.4% rate of return

[2] The carrier had been informed by the Board at the time the rate was fixed that any economies in operations which might be achieved would "inure to the carrier in the form of higher earnings" (9 C. A. B. at p. 812).

which had been earned under the final domestic rate mandatorily was required to be deducted from the international mail pay allowance for the same period. The Board held that (R. 54):

> * * * while we are required to take into consideration the need of a carrier for mail compensation together with "all other revenue," we believe that we are not required by Section 406 (b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy.

The Board concluded, as a matter of economic policy, that the offset contended for by the Postmaster General should not be made.[3]

In so concluding, the Board found that: (1) since final mail rates cannot always be fixed simultaneously for both international and domestic divisions, the incentive for efficient air carrier operations which results from final rates is such as to justify the fixing of final rates for one division in advance of the other and a subsequent

[3] The Board determined that total mail pay should be allowed for the international operations for the past period in the amount of $3,662,000 (R. 58). In so determining, the Board fixed the international "break-even need", i. e., the amount of money necessary to equalize income and outgo, at $3,122,000 (R. 19). Return on international investment at the rate of 7% was allowed in the amount of $393,000 (R. 23), and an allowance for actual tax liability was granted in the amount of $147,000 (R. 57). After taking the $654,000 in domestic profits into consideration, the Board determined not to reduce the international mail pay allowance by this amount.

refusal either to make up losses or offset profits resulting under the final rate when fixing final rates for the other divison (R. 20, 21); (2) the comparative domestic status between domestic carriers having foreign routes and those which do not have foreign routes should be maintained by treating domestic and international operations as entirely separate, both for administrative reasons and so that uniform domestic class rates may be fixed for groups of domestic carriers under which there will be a competitive incentive for efficient domestic operations (R. 54, 55); and (3) domestic profits should not be required to be used to support economically weaker international operations in that such support will thwart the progress of domestic operations toward self-sufficiency and deprive the public of the advantages which will result from keeping the domestic industry in a financially sound position (R. 54).

The Court of Appeals, with one judge dissenting, reversed the Board's order. The majority opinion held that, although the Board had authority to fix rates separately for different operating divisions, "the end result of fixing rates for a carrier must not go beyond that point where the total subsidy exceeds the need of the carrier as a whole" (R. 71). The majority below also characterized the Board's action as "initiating a new 'incentive' policy" (R. 71). Stating that the Board had theretofore held that the "need" of an air carrier for mail pay was "that of the

air carrier as a whole and not that of any particular geographical division of its operations" (R. 72), and equating the statutory phrase "take into consideration" as equivalent to "offset," the majority stated (R. 72)

> We agree with those pronouncements of the Board. We think they correctly indicate the duty of the Board in fixing "fair and reasonable rates of compensation" under § 406 (b) in each case to "take into consideration, among other factors * * * all other revenue of the air carrier."

Judge Prettyman would have affirmed the Board's order. His dissenting opinion states in part (R. 76, 77):

> It seems to me that the Board could require the foreign transportation and the domestic transportation to stand each on its own feet, neither to be supported by the other. When Congress gave the Board power to fix different rates for different classes of service, it meant for the Board to make separate calculations for each service and rate.
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> So I reach the conclusion that, when the Board is determining a separate rate for a certain type of mail service, the "all other revenue" which it must "take into consideration" means revenue related to that service for which the rate is being fixed. But, if I am in error in that construction of those statutory terms, I am so convinced

of the soundness of a complete separation of this foreign rate from the domestic operation that I would have to agree with the Board that the elastic statutory phrase "take into consideration" is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation, even after such earnings are taken into consideration.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that Section 406 of the Act mandatorily required the reduction of the mail rate for C. & S.'s international division by the amount of profit above a 7.4% return on investment which had been earned under the final mail rate for the domestic division.

(2) In holding that, when domestic and international operating divisions of the same air carrier reasonably are classified as separate rate-making units, Section 406 of the Act requires the Board to reduce an otherwise "fair and reasonable" mail rate for one division by deducting, as "other revenue" against "need" for mail pay, profits above a specified fair return on investment which have been earned or are anticipated to be earned from the operations of the other division.

(3) In failing to recognize and to hold that, in fixing "fair and reasonable" mail rates, the Board has sound discretionary authority to refuse in ap-

propriate cases, for reasons of regulatory policy, to offset certain categories of "other revenue" against the "need" of air carriers for mail pay allowances.

(4) In holding that the Board's refusal to reduce C. & S.'s international mail pay allowance by deducting the profits above a 7.4% return on investment realized from the final domestic mail rate constituted a "new 'incentive' policy."

(5) In holding that prior rulings of the Board required the deduction of the domestic profits above a 7.4% return on investment from the international mail pay allowance.

(6) In reversing the order of the Board.

REASONS FOR GRANTING THE WRIT

This case raises questions of major importance in the administration of the Civil Aeronautics Act which have not been, but should be, passed upon by this Court. The majority below has required the Board to reduce a divisional mail rate otherwise "fair and reasonable" by the application of profits earned under a final mail rate order for another operating division of the carrier. The rule of law announced by the Court, if permitted to stand, will require the same action in other similar cases now pending before the Board. More important in its impact upon the administration of the Act and the air transportation system is the lower Court's denial to the Board of the discretionary authority conferred

by the Act and possessed by all regulatory agencies of classifying different operating divisions of a carrier as separate for rate-making purposes, and of fixing rates at a level which will sustain each operating division independently of the other.

Four of the present thirteen domestic trunk lines (Braniff, Delta-C. & S., Northwest, and TWA) engage in both domestic and international operations which, because of their extensive nature, are classified as separate units for rate-making purposes.* Because of the uncertainties of foreign operations and the necessity for experience as to the cost of operating foreign routes, the Board has been unable to fix final international rates as promptly as domestic ones. Accordingly, the Board in the past has fixed final rates from time to time for the domestic operations of all four of these carriers, while continuing temporary rates in effect for their international operations. The Board's action in fixing final domestic rates has been for the purpose of obtaining the benefits which flow from placing carriers on final rates under which they will either reap the benefits or stand the losses from future operations.

*Five other carriers (American, Eastern, United, National, and Colonial) conduct foreign or overseas operations which in the past have been regarded as separate units for rate-making purposes but which presently are regarded as "stub-end" operations sufficiently integrated with domestic operations so as to make feasible the fixing of mail rates on a system basis.

In some instances, these final domestic rates have been service or compensatory "class rates" under which the carriers have been forced to compete domestically with other carriers of their class in securing revenue and in reducing or controlling costs.[5]

The decision below makes no distinction between profits obtained under final need rates and those obtained under final service rates. None of the carriers were on notice that they would be required in effect to refund sums earned under these rates in the guise of having any domestic profits above a specified fair rate of return deducted from their international mail pay allowances.[6] Proceedings are now pending before the

[5] "Service rates" are rates which are regarded as containing no element of subsidy, and which merely provide just compensation for carrying the mail.

Domestically, TWA presently is classified with American, Eastern, and United as the "Big Four" carriers paid at the lowest service rate for domestic operations, 45 cents per mail ton mile. Braniff, Delta-C. & S., and Northwest presently are classified for domestic operations with three other domestic carriers (Capital, National, and Western) as falling within the group of carriers paid at a service rate of 53 cents per mail ton mile.

[6] Contrary to the implications of the majority opinion (R. 72), the Board consistently has refused either to offset profits or make up losses resulting from final domestic rates when fixing international rates for the same period. See *e. g.*, *Pennsylvania Cent. Air Et Al, Motions*, 8 C. A. B. 685, 703, *affirmed sub. nom. Transcontinental & Western Air* v. *Civil Aeronautics Board*, 83 U. S. App. D. C. 358, 169 F. 2d 893; 336 U. S. 601. The prior Board decisions relied upon by the majority below dealt either with cases in which the entire air carrier system was the rate-making unit, or where

Board for the fixing of final international rates for TWA and Braniff for periods which embraced operations under the final domestic rates. Under the decision of the Court of Appeals, any such profits realized by these carriers under their final domestic rates also are subject to recapture. Cf. *Transcontinental & Western Air* v. *Civil Aeronautics Board,* 336 U. S. 601.

Of greater concern to the Board, however, is the impact of the majority decision upon future administration of the Act, and the effect which it will have upon both domestic and international operations. Just as the opinion makes no distinction between profits realized under either need or compensatory rates, so also are the principles laid down by the Court applicable to the fixing of final rates for future periods. Profitable domestic operations presently are being conducted by most trunkline carriers under service or compensatory mail rates, and the Board is of the view that the public interest requires the retention of these domestic profits for the strengthening and improving of the domestic services. International operations are subsidized in the form of need rates, and the Board has anticipated that subsidy support will be required for international operations for some time to come. If the entire air carrier system must be used as the rate-making

the "excess profits" involved accrued under temporary rates and hence were subject to recapture either directly or by offset against subsidy need for other divisions.

unit in fixing rates for both past and future periods, then the Board's present classification procedures and practices in establishing domestic mail rates will be seriously impaired, together with their purposes and benefits.

Under the Court's decision, so-called "excess" domestic profits earned under service rates by carriers engaged in both domestic and international operations cannot be retained by them so long as subsidy support is required for their international operations. Rates which are truly final and which provide an incentive for efficient operations can never be fixed for one operating division in advance of the other. Further, it is unlikely that Braniff, Delta-C. & S., Northwest, and TWA, even under the most favorable and efficient operating conditions, can long be retained in their present domestic classifications or in their present category as service rate carriers for domestic operations. Present and foreseeable conditions in air transportation are such that the domestic earnings of these carriers under their existing service rates will be insufficient to support their international operations. The Board has tried to encourage efficiency in domestic service by grouping carriers together and fixing class rates. Under such rates the most efficient member of the class can earn a greater profit. Such incentive and classification disappear if the profits so made must go to subsidizing a losing international service. Indeed, the easy road for the

carrier is to become permanently subsidized as to its whole system. Such a tendency is hardly calculated to save the government money.

Of equal or greater impact upon the administration of the Act and the air transportation system is the threat posed by the decision below to the future participation in international operations by domestic carriers. The decision may compel the reorganization of our international air transportation system, and lead to the abandonment of international operations by domestic carriers contrary to the established policy of the government.

TWA operates a transatlantic route from New York to India via London, Rome, Cairo and the Middle East; Northwest operates a route to the Orient via Alaska and Tokyo; Braniff operates a route between the United States and Brazil and Buenos Aires via Havana, Balboa, and the west coast of South America. Chicago and Southern operates through the Caribbean area. These comprise important links in the organization of United States flag international air service. Every one of these routes was placed in operation with the approval of the President upon recommendation not only of the Board but also of interested departments, including the State Department and the defense establishment. They are operated and subsidy is provided for that purpose in large measure because of the relation-

ship of such operations to the security of the United States.

In each instance the Board selected a domestic carrier to operate the route because it found that such a carrier could do a cheaper and more effective job than other applicants and that such operations would contribute to the development of air transportation in accordance with statutory objectives.[7] The alternatives were (a) monopoly in the hands of a non-domestic air carrier; (b) operation by a new corporation organized for that purpose with inadequate financing and experience to do the job required; or (c) operation by a surface carrier leading to a concentration of both surface and air transportation in the same hands contrary to long established national policy. All of these alternatives were and remain undesirable to the public interest. Yet the decision of the Court of Appeals could directly result in an undermining of the existing organization of our international air services and lead to the substitution of one of these undesirable alternatives.

[7] The selection of domestic carriers to perform international services benefits international operations in that existing headquarter staffs and facilities can be used in both operations, thereby permitting more economical operations than would be possible if both operations were conducted by separate carriers. Further, carriers engaged in both operations can provide a more convenient international service through the medium of single-carrier service between all of the domestic and foreign points served by them than would be possible through interchange of traffic between separate carriers.

Domestic commercial rates must be maintained at approximately the same level for all of the trunk-line carriers for competitive reasons, and the carriers engaged in both domestic and international operations compete with carriers operating only domestically. If the unprofitable foreign operations are required to be supported from domestic profits, then carriers engaged in both types of operations will not obtain the earnings realized by wholly domestic operators. Under these circumstances, domestic carriers will no longer desire to conduct international operations.[8]

The decision below thus is of grave concern to the Board and the entire air transport industry. Moreover, we believe it to be erroneous. Proceeding upon the premise that mail rates are to be fixed in accordance with traditional public utility rate-making concepts, the majority below nevertheless has denied to the Board the traditional authority of rate-making bodies to establish separate rate-making units and to set rates at a level which will sustain the particular unit. Section 416 (a) of the Act (*infra,* p. 23) expressly em-

[8] The Board recently has instituted an investigation of a possible merger between Western Air Lines and Pacific Northern Air Lines, a carrier conducting operations within Alaska and between Alaska and the United States. Western has indicated to the Board since the decision below that it is not interested in the prospect of any such merger if as a consequence it will be required to utilize any profits on its domestic operations to support operations to and within Alaska.

powers the Board to classify carriers according to the "nature of the services performed," and Section 406 (*infra,* pp. 22–23) authorizes the fixing "from time to time" of "different [mail] rates for different air carriers or classes of air carriers, and different classes of service." Where a rate-making unit reasonably is established under the Board's classification powers, the Board in its sound discretion may regard that unit as the "air carrier" for purposes of Section 406. If the statutory requirement to "take into consideration * * * all other revenue of the air carrier" is equivalent to a command to offset all other revenue, then, as Judge Prettyman pointed out in his dissent (R. 76), the Board need offset only that other revenue attributable to the rate-making unit involved.

Further, if the term "air carrier" as used in Section 406 relates in all cases to the entire air carrier system, it still does not follow that revenues derived from domestic operations must be used to reduce mail pay for international operations. The duty of the Board is to fix a "fair and reasonable" mail rate, and a rate for one operating division does not become unreasonable as a matter of law merely because the rate is not reduced through the application of profits earned from operations of other divisions. "Need," and "other revenue" to be used in computing need, are merely factors which the Board is to "take into consideration, among other factors," in deter-

mining fair and reasonable rates. The other factors which the Board is required to take into account obviously include all of the purposes intended to be served by the Act (See Section 2, *infra,* p. 20). As Judge Prettyman indicated (R. 77), the Congress did not say that "all other revenue" must be offset against need for mail pay in all cases, or that the minimum amount necessary for continued operations always marks the limit of a fair and reasonable rate. It left to the Board the power and the duty to weigh and evaluate the various factors to be taken into account in fixing a fair and reasonable rate without binding the Board as to the part that its "consideration" of the individual factors shall play in the final determination. *cf. Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604; *New York* v. *United States,* 331 U. S. 284, 345–349. We believe that the majority below has erroneously denied to the Board a clear discretionary authority conferred upon it by the Congress.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

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I hereby authorize the filing of the foregoing petition for a writ of certiorari.

OSCAR H. DAVIS,
Acting Solicitor General.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] are as follows:

Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-

[1] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety, and

(f) The encouragement and development of civil aeronautics.

Rates for Transportation of Mail

Authority to fix rates

Sec. 406 (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropria-

tions for the transportation of mail by aircraft.

RATE-MAKING ELEMENTS

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS

CLASSIFICATION

SEC. 416 (a) The [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the [Board] finds necessary in the public interest.

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